Supreme Court of the United States

OCTOBER TERM, 1944.

No. 188.

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION,

Petitioner,

vs.

IRVING TRUST COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE IRVING TRUST COMPANY IN OPPOSITION.

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Opinion Below.

The opinion of the Court of Appeals of the State of New York is reported in 292 N. Y. 347, and is set forth in full at pages 96 to 105, inclusive, of the record.

Jurisdiction.

The jurisdiction of this court is invoked under section 237 (b) of the Judicial Code, 28 U. S. C. A. 344 (b).

The Question Presented.

By the first of two causes of action set forth in the complaint (R. 35) petitioner seeks to set aside as preferential within section 60a of the Bankruptcy Act the transfer of

$150,000 made by Graves-Quinn Corporation (hereinafter referred to as "Graves-Quinn") to respondent. One of the issues raised by the pleadings is whether the transfer occurred within or without the statutory four months. Upon facts that are not disputed respondent moved for judgment dismissing this cause of action on the ground that the transfer occurred more than four months before the filing of the petition in bankruptcy.

Both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals held that the transfer was outside the four months' period. Accordingly, the first count of the complaint was dismissed.

The ultimate question is whether the transfer was so far perfected outside the four months' period that no purchaser from the bankrupt and no creditor could thereafter acquire any rights in the property transferred superior to those of respondent.

Statutes Involved.

Title 31 U. S. C. A., section 203, as amended by Assignment of Claims Act of 1940.

Section 60a of the Bankruptcy Act, as amended by the Chandler Act of 1938.

These statutes are printed at pages 11 to 13, inclusive, of the petition.

Statement.

In September 1940 Graves-Quinn entered into a contract with the War Department for the construction of military housing at various points in New England for the stated consideration of $1,008,800. Graves-Quinn applied for and received necessary financing from respondent. The

first loan was made on October 10, 1940, in the amount of $30,000. Thereafter, and throughout the life of the contract, additional loans in varying amounts were made (R. 12). According to the agreement (R. 10, 98) outstanding loans were retired from time to time as Graves-Quinn received payments on the contract.

As the work progressed Graves-Quinn required more assistance than was at first anticipated. It was because of the greater need that respondent obtained on November 22, 1940 as security an assignment of the moneys due and to become due on the contract (R. 67).

The filing prescribed by the Assignment of Claims Act of 1940 was completed on December 3. The consent of the Secretary of War was obtained on December 5. Thereafter payments on the contract were made by the government direct to respondent (R. 10).

In the meantime, and on November 27, 1940 Graves-Quinn received on account of its performance of the contract a check from the government for $155,865.50 (R. 8). On the same day Graves-Quinn mailed this check from Boston to respondent in New York along with its own check for $150,000 drawn to the order of respondent (R. 9). These checks were physically received by respondent on November 28 (R. 9). At the time of their receipt the deposit account of Graves-Quinn was overdrawn and respondent held four notes of Graves-Quinn aggregating $150,000 (R. 7, 76). These notes were retired on November 28 out of the government payment covered by the assignment (R. 10). Exactly four months later, and on March 28, 1941, which was some weeks after the contract had been fully performed by Graves-Quinn, the petition in bankruptcy was filed (R. 35).

Petitioner maintains that payment on November 28 fixes the time of the transfer. Respondent maintains that the

time of the transfer is fixed by the consummation on November 27, if not before, of its security right in the fund from which the payment was made.

The Court of Appeals decided the issue on the facts present in the case relevant to the issue.

Petitioner has been persistently unwilling that the issue be resolved on the relevant facts. Even before this court petitioner continues his misuse of irrelevant facts.

Such is his undertaking to impugn the motives of respondent. The charge made would be frivolous if true. It is false. The Appellate Division only reflected the record when it stated that respondent took the assignment in good faith (R. 92).

Of like quality is petitioner's contention about the relevant rights of surety and bank. He purports still not to apprehend that if the surety is entitled to the money received by the bank, the trustee is not entitled to it. Judge Lehman disposed of the contention in these words (R. 105):

> "The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person."

Argument.

The Appellate Division and the Court of Appeals were in unanimous agreement that the transfer occurred outside the four months' period.

The Appellate Division held that as against the trustee respondent was entitled to the moneys received out of the government payment because no purchaser from Graves-Quinn and no creditor could acquire a right superior to that of the bank after delivery of the instrument of assign-

ment on November 22, regardless of the time of the filing and consent.

The Court of Appeals chose to place its affirmance on the broader base available because of the facts peculiar to the case. In order to find that the bank acquired a special property in the government payment it was not necessary to hold that the assignment was operative as against a subsequent assignee before the filing and consent. There was no such assignee and down to the close of November 27 petitioner is concluded by the facts.

What in essence the Court of Appeals decided was that because prior to November 28 and outside the four months' period (1) the bank had the instrument of assignment; (2) Graves-Quinn had the government check for $155,865.50, with the duty by virtue of the assignment to turn it over to the bank; and (3) Graves-Quinn on November 27 delivered the check to the bank by depositing it in the mails addressed to the bank, no purchaser from Graves-Quinn and no creditor could acquire a right to the check superior to that of the bank within the four months' period.

Petitioner is no more baffled by an unanswerable judicial declaration such as that of the Court of Appeals than he is by an adverse fact.

Of the holding that Graves-Quinn was bound to deliver the government check to the bank, petitioner says (Br. 22):

> "In so holding the Court of Appeals entirely misconceived the purport of section 60a of the Bankruptcy Act, for under that section the trustee could have intervened on November 27th and prevented the payment."

The misconception is on the part of petitioner. The transfer was perfected on November 27, if not before. The trustee must accept the facts of November 27 as they were.

The authority of the trustee to assail a transfer in the right of the phantom creditor of Section 60a dates only from November 28. That is too late.

The Court of Appeals took note of the four months' limitation on the availability to the trustee of the statutory fictions. Petitioner talks as if the limitation did not exist.

To urge as petitioner does (Point V) that federal law is applicable as if there were a conflict on which the case turns is pointless. The Court of Appeals, as the opinion shows, closely examined section 60a of the Bankruptcy Act and the Assignment of Claims Act of 1940.

What state law has been followed to the exclusion of applicable federal law is not obvious. It was this court which held in *Martin* v. *National Surety Company*, 300 U. S. 588, decided before the Assignment of Claims Act of 1940, that an assignment void on its face under section 203, title 31 U. S. C. A. might be given effect after payment made by the government. Certainly respondent as a beneficiary of the Assignment of Claims Act of 1940 is not less well off with the statute than it would be without it.

Petitioner is twice wrong respecting the doctrine of relation back. He is mistaken in thinking that the doctrine is destroyed by section 60a as it now reads. He is also mistaken in thinking that respondent is dependent on the doctrine.

The courts of New York did not overlook, and we do not overlook the full significance of the 1938 amendment of section 60a. By the new definition of the time when a transfer is deemed to be made, some transactions are brought within the time range of section 60a, and therefore open to attack, that were before safe from attack.

A case such as *Goldstein* v. *Rusch*, 56 F. (2d) 10, brought by a trustee to set aside a pledge of tangible property,

would not be decided the same today. It made no difference before 1938 that a pledge made outside the four months' period was completed by change of possession of the thing pledged inside the four months' period. It makes a difference now. It is the reason for the difference which petitioner misapprehends.

There has always been an infirmity in the pledge of a chattel so long as the pledgee did not reduce the chattel to possession. So long as change of possession is deferred it is now, and always has been, possible for a subsequent assignee to acquire a superior right. That is a limitation on the doctrine of relation back that is as old as the doctrine itself. The present section 60a takes advantage of this limitation, with the result that the four months' bar is of no avail to the pledgee unless his rights as against a subsequent pledgee have been perfected prior to the start of the four months' period.

Corn Exchange National Bank v. *Klauder*, 318 U. S. 434, did not "specifically", as petitioner says (Point III), or otherwise repudiate the doctrine of relation back. What it did was to give effect to the qualification that is part and parcel of the doctrine, as required by section 60a.

Petitioner misses the real significance of the *Klauder* case, which is that the rights of successive assignees are not to be determined by section 60a. That is left to other law, now as heretofore.

The *Klauder* case turned on the time when the assignee of accounts receivable so perfected its right as to be secure against the claim of a subsequent assignee. The issue was decided by the law of Pennsylvania. By that law the assignee of an account who first gave notice to the debtor had first right. The assignment, therefore, was only perfected when the assignee notified the debtor.

In *Rockmore* v. *Lehman*, 129 F. (2d) 892 (cert. den. January 18, 1943, 87 L. Ed. 403) a result contrary to that in the *Klauder* case is accounted for by the fact that by the law of New York, which controlled, notice to the debtor is not necessary to perfect the right of an assignee of an account receivable as against a subsequent assignee. That being so, the assignment was perfected with the delivery of the instrument of assignment.

Since *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the federal courts have had no independent law on the subject. Prior to that decision, and at least after the decision in *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, the federal rule was the same as that of the State of New York and of numerous other states.

There is no applicable law, federal or state, of which we have been apprised, which would give to a purchaser from Graves-Quinn subsequent to November 22, 1940 any right in the moneys assigned, whether the purchase was made before or after filing by respondent was completed and the consent obtained. If there is such law, it does not save petitioner. As to the government payment on November 27, and that is the extent of our present interest, no purchaser could come between the bank and the money assigned within the four months' period. That is the test of section 60a and by it petitioner is precluded. The doctrine of relation back might be as dead as petitioner says it is and he would not be helped.

Petitioner in his Point VI urges that form should prevail over substance. The facts as of November 27 and earlier control and not the routine by which payment was effected on November 28. Defendant had a special property in the fund out of which the debt was paid which was not lost in the very process employed to cancel the debt.

Conclusion.

There is no adequate reason, if indeed there is any reason at all, for a review by this court. There is no question of general importance. The decision of the Court of Appeals turns upon the facts of this case, and the facts are such that no arguable construction of either section 60a of the Bankruptcy Act or the Assignment of Claims Act of 1940 is involved. All that the Court of Appeals needed to do to find that the trustee was barred by the statutory limitation, and what it did, was to invoke recognized principles of law governing the transfer of property rights. Every contention of petitioner that the Court of Appeals acted in disregard of the federal statutes is predicated on a false premise. The petition should, therefore, be denied.

Respectfully submitted,

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